

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHRIS W. ROSS

Claimant

VS.

SHAWNEE COUNTY REFUSE DEPT.

Respondent

Self-Insured

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Docket No. 217,771

ORDER

Claimant requests review of the preliminary hearing Order Denying Compensation entered by Administrative Law Judge Floyd V. Palmer dated May 9, 1997.

ISSUES

In his Petition for Review, claimant lists the following as issues for Appeals Board review:

- "1. All issues determined adversely to claimant.
- "2. Whether notice was given within 10 days and/or whether just cause was shown for failure to give 10 days notice.
- "3. Whether TTD compensation should have been granted.
- "4. Whether medical benefits should have been ordered paid by respondent."

Also, respondent in its brief raises the issue of whether claimant suffered personal injury by accident arising out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds for purposes of preliminary hearing as follows:

The jurisdiction of the Appeals Board to review preliminary hearing orders entered pursuant to K.S.A. 44-534a, as amended, is limited to issues involving the Administrative Law Judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. See K.S.A. 44-551(b)(2)(A), as amended. "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether defenses apply, shall be considered jurisdictional, and subject to review by the board." K.S.A. 44-534a(a)(2), as amended. Accordingly, the issues raised by claimant as to payment of medical benefits and payment of temporary total disability compensation are not subject to review on an appeal from a preliminary hearing order.

The Administrative Law Judge based his denial of benefits upon claimant's failure to prove notice of accident to the employer within ten days and claimant's failure to establish just cause for his failure to give said notice as required by K.S.A. 44-520. The Administrative Law Judge also decided the issues of claimant's accident date and whether the claimant's injury arose out of and in the course of his employment with respondent on the dates alleged. However, as the Administrative Law Judge's Order was based upon the issue of notice, that issue will be addressed first.

K.S.A. 44-520 provides:

"Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

In denying compensation, the Administrative Law Judge found claimant was most likely injured in December 1995. There is considerable discussion in the respective briefs of the parties concerning the appropriate date of accident for purposes of determining whether claimant gave timely notice of accident. The Appeals Board must decide the date of accident in order to resolve the issue of notice because notice would not have been timely given for the December 1995 accident date espoused by respondent but would be timely for the June 4, 1996, accident date argued by claimant. The issue turns in part upon the question of whether the accident date should be the date claimant "discovered" his injury was work related after seeking medical treatment, as claimant alleges, or an earlier date as is asserted by respondent.

Claimant alleges he suffered personal injury to his left ankle by a series of accidents which occurred each and every working day from December 1995 through June 4, 1996, when he first sought medical treatment. Claimant argues that date of accident should be determined by the last injurious exposure rule. According to claimant this case is more analogous to an occupational disease claim rather than a single traumatic event because the claimant delayed seeking medical treatment until he could no longer tolerate the pain and it was not until then that claimant discovered he had suffered an injury by accident within the meaning of the Workers Compensation Act. Respondent alleges claimant's accident was December 28, 1995, the date claimant put on the report of accident. Notice was not given until June 7, 1996.

Claimant described an incident in December 1995 where he jumped off a truck and felt a sting in his foot or ankle. He continued working thereafter and his symptoms progressively worsened to the point where he sought medical treatment in June of 1996. Although this history was not initially given to Scott M. Teeter, M.D., when he evaluated claimant on June 4, 1996, Dr. Teeter's report indicates claimant's "ankle pain [is] probably related to multiple recurrent injuries and degenerative condition in this possible loose body or arthritic degenerative change."

Kenneth E. Teter, M.D., indicated that the most likely cause of claimant's injury was the trauma he sustained in December of 1995. This was likewise the history claimant gave to orthopedic surgeon Robert R. Payne, M.D., to whom claimant was initially referred by Dr. Scott Teeter.

Claimant was referred by his employer to Michael J. Poppa, D.O., for an independent medical examination. Dr. Poppa opined that claimant's left foot and ankle condition and the subsequent surgery were not causally related to claimant's employment with respondent.

The Appeals Board finds claimant has not met his burden of proving a work-related permanent aggravation of his left foot and ankle injury following the single traumatic event in December 1995.

Using the first date claimant gave respondent, that being December 28, 1995, as the date of accident, notice was given beyond the 75 days which is the longest time period permitted by statute for the giving of notice.

There is no dispute between claimant and respondent concerning when claimant gave notice of accident to respondent. The Administrative Law Judge found that the June 1996 notice claimant gave to respondent occurred more than 10 days (and more than 75 days) from the December 1995 date of accident. Because claimant did not give notice of accident within 75 days after the date of his accident his claim is time barred. There is no allegation the employer had actual knowledge of the accident or that the employer was unavailable to receive such notice or that the employee was physically unable to give notice. Accordingly, based upon the record as it currently exists, claimant has failed in his burden to prove timely notice was given pursuant to K.S.A. 44-520. The Order of the Administrative Law Judge should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order Denying Compensation entered by Administrative Law Judge Floyd V. Palmer dated May 9, 1997, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Jeff K. Cooper, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director